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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976
Misc. No.-

MICHAEL LEE SIMPSON — PETITIONER

V.

UNITED STATES OF AMERICA — RESPONDENT

PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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The Petitioner, MICHAEL LEE SIMPSON, respectfully prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 17, 1976, and October 14, 1976.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. The Order denying the Petition for Rehearing, not yet reported, appears in the appendix hereto.

Jurisdiction

The Judgment of the Court of Appeals for the Sixth Circuit was entered on October 14, 1976. A timely Petition for Rehearing was denied on November 17, 1976, and this Petition for Certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

1. Whether the imposition of a ten (10)-year sentence under Title 18 U.S.C. §924(c), and a twenty-five (25)-year sentence under Title 18 U.S.C. 2113(a)(d), was duplicious and in violation of Petitioner's constitutional rights, when both convictions and subsequent sentences resulted from the same set of factual circumstances.

Statutory Provisions Involved

1. United States Code:
   Title 18, §2113(a)
   Whoever, by force or violence, or by intimidation, takes or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association;
2. United States Code:
   Title 18, §2113(d)
   Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.
3. United States Code:
   Title 18, §924(c)
   Whoever - uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, . . . shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment of not less than one year nor more than ten years. In the case of a second

or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provisions of law, the court shall not suspend the sentence in the case of the second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the conviction of such felony.

Statement of the Case

Petitioner, MICHAEL LEE SIMPSON, was charged with Aggravated Bank Robbery under Title 18 U.S.C. 2113(a)(d) and the Use of a Firearm During the Commission of a Felony, Title 18 U.S.C. 924(c), in the Eastern District of Kentucky. After a trial by jury on February 24, 1976, Petitioner was found guilty on both counts, and he was given a twenty-five (25)-year sentence on the Aggravated Bank Robbery Count and a ten (10)-year consecutive sentence on the Use of a Firearm Count.

A timely Notice of Appeal was filed and this case was presented to the United States Court of Appeals for the Sixth Circuit. On October 14, 1976, the United States Court of Appeals for the Sixth Circuit entered an Order affirming the decision of the lower court. A timely Petition for Rehearing was filed and the United States Court of Appeals for the Sixth Circuit denied the Petition for Rehearing on November 9, 1976.

Both counts of the indictment arose out of the single robbery of the Commercial Bank, Middlesboro, Kentucky, by the use of a dangerous weapon, to wit: a handgun.

Reasons for Granting the Writ

1. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS IN CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AS TO WHETHER OR NOT A SENTENCE UNDER TITLE 18 U.S.C. 924(c) CAN BE ASSESSED WHEN THE FELONY IS A VIOLATION OF TITLE 18 U.S.C. 2113(a)(d).

The United States Court of Appeals for the Sixth Circuit in its Opinion held that the two statutes Title 18 U.S.C. 2113(a)(d) and Title 18 U.S.C. 924(c) related to separate offenses involving different elements and that they were not duplicious. The Court cited the cases of United States v. Crew, ____F.2d.____ (4th Cir. No. 75-1581, 1976) and Perkins v. United States, 526 F.2d, 688 (5th Cir. 1976).

In the case of United States v. James Theodore Eagle, ____F.2d.____ (8th Cir.No.75-1926), the United States Court of Appeals for the Eighth Circuit held that the legislative intent was clear that a conviction under Title 18 U.S.C. 924(c) could not follow a conviction under another statute, as for example Title 18 U.S.C. 2113(d), which provided for an increased punishment when a dangerous weapon or device was used to commit the felony. The Eagle case went on to cite legislative comment by Representative Poff, the amendment's sponser, as set out below:

> "For the sake of legislative history, it should be noted that my substitute is not intended to apply to Title 18, Sections 111, 112, or 113 which already define the penalties for use of firearms in assaulting officials, with Sections 2113 or 2114 concerning armed robberies of the mail or banks, with Section 2231 concerning armed assaults upon process servers or with Chapter 44 which defines other firearm felonies."

114 Cong. Rec. 22232 (1968) (remarks by Representative Poff).

Therefore, due to the disparity between the different circuits, it is necessary for this Court to resolve the conflict between the circuits. At the present time, the law is unclear and leaves Federal Offenders without a clearly defined interpretation of this question.

Conclusion

For these reasons, a Writ of Certiorari should be issued to review the Judgment and Opinion of the Sixth Circuit.

Respectfully submitted,

Robert W. Willmott, Jr.

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ATTORNEY FOR PETITIONER
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Lexington, Kentucky 40507

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
OCT 14 1976
JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee
vs Nos. 76-1459 & -1466
MICHAEL LEE SIMPSON,
Defendant-Appellant

UNITED STATES OF AMERICA,
Plaintiff-Appellee
vs Nos. 76-1460 & -1465
TOMMY WAYNE SIMPSON,
Defendant--Appellant

ORDER

Before WEICK, PECK and ENGEL, Circuit Judges.

Upon consideration of the record, the briefs and oral arguments of counsel we are of the opinion that the defendants were properly charged with the armed robbery of two banks, on different occasions, and were convicted by juries in two trials, and they received consecutive sentences for violations of 18 U.S.C. § 2113(d) and 18 U.S.C. § 924(c).

The two statutes, in our opinion, relate to separate offenses involving different elements, and they are not duplicitous. United States v. Crew, ___ F.2d __ (4th Cir. No.75-1581, 1976). Perkins v. United States, 526 F.2d 688 (5th Cir. 1976). The District Court was not required to impose concurrent sentences

Eastern District of Kentucky
FILED
NOV 23 1976
AT LEXINGTON
DAVID T. McGARVEY
CLERK, U.S. DISTRICT COURT

for the two separate bank robberies nor under the two statutes.

Finding no prejudicial error either in the convictions or in the sentences, it is ORDERED that the judgments of conviction be and they are hereby AFFIRMED.

ENTERED BY ORDER OF THE COURT.

John P. Hehman
Clerk

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
by Daisy Cohen
Deputy Clerk

ISSUED AS MANDATE: November 22, 1976 in 76-1459(Michael Lee Simpson) 76-1460 (Tommy Wayne Simpson), and 76-1165 (Tommy Wayne Simpson)

COSTS: None

No. 76-1466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
NOV 17 1976
JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee	:	
vs	:	ORDER
MICHAEL LEE SIMPSON,	:	
Defendant-Appellant	:	

Before WEICK, PECK and ENGEL, Circuit Judges.

Upon consideration it is ordered that the petition for rehearing filed herein by defendant-appellant, Michael Lee Simpson, be and the same is hereby denied.

ENTERED BY ORDER OF THE COURT.

John P. Hehman
Clerk

see

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